OCT 28 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 637

CAROLINA SCENIC COACH LINES, A CO-PARTNERSHIP,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR AFFIRM

WILLIAM A. ROBERTS,
JAMES E. WILSON,
R. G. CHERRY,
Counsel for Appellee, Smoky Mountain Stages, Inc.

INDEX

Subject Index

	Page
Motion to dismiss or affirm	1

Table of Cases Cited

Dobson v. *Commissioner*, 320 U. S. 489	8
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591, 64 Sup. Ct. 281	8
Helvering v. *Clifford*, 209 U. S. 331, 60 Sup. Ct. 554, 84 L. Ed. 301	7,8
Interstate Commerce Commission v. *Jersey City*, 64 Sup. Ct. 1129	7
Loving v. *U. S.*, 310 U. S. 609	8
McLean Trucking Co. v. *U. S.*, 321 U. S. 67, 64 Sup. Ct. 370	7
Matton Steamboat Co. v. *Murphy*, 319 U. S. 412	3
North Coast Transportation Co. v. *U. S.*, 54 F. Supp. 448, (Nos. 274–275, October Term, 1944,—No. 274–Appeal dismissed. No. 275—Affirmed October 9, 1944)	9
Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125, 59 Sup. Ct. 754, 83 L. Ed. 1147	7
Virginia Stage Lines v. *U. S.*, 48 Sup. Ct. 79	8
Western Chemical Co. v. *U. S.*, 271 U. S. 268	7

Statutes Cited

Interstate Commerce Act:	
Part II, Section 205a (49 U. S. C. 305a)	4,9
Part II, Section 207	3
Rules of the Supreme Court of the United States, Rule 12:	
Par. 1	3
Par. 2	3
Par. 3	1,3
Urgent Deficiencies Act of October 22, 1913	1
United States Code, Title 28, Section 47a	1,2

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

Civil Action No. 507

CAROLINA SCENIC COACH LINES, A CO-PARTNERSHIP,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

MOTION TO DISMISS OR AFFIRM

Appellee, Smoky Mountain Stages, Inc., hereinafter referred to as Smoky Mountain, pursuant to Rule 12, paragraph 3, moves that the decree of the District Court be affirmed or dismissed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint to set aside an order of the Interstate Commerce Commission. Findings of fact, conclusions of law, and final decree were entered by the District Court on July 21, 1944.

The order allowing the appeal of appellant was signed by one of the judges constituting the three judge court on September 27, 1944. Title 28 U. S. C. 47(a) provides that appeals to the Supreme Court from a final decree or judgment of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court

be taken by the aggrieved party within sixty days after the entry of the final judgment or decree. Upon investigation appellee, Smoky Mountain Stages, Inc., has ascertained that appellant filed with the Clerk of the United States District Court for the Western District of North Carolina its petition for appeal to the Supreme Court on September 1, 1944. The presentation of the order allowing the appeal to the District Court was held in a state of suspense at the request of counsel for appellant pending final determination by its counsel as to whether they would perfect the appeal. The files of the District Court were examined on September 28, 1944, and it was discovered that there was no bond on appeal, supersedeas bond or citation or order allowing appeal. Upon later examination of the files of the Clerk of the District Court, it was ascertained that an order allowing appeal was signed by one of the District Judges on September 27, 1944, and that the Deputy Clerk had received oral instructions from one of appellant's counsel to present the order to the Court at the term commencing September 25th.

The filing of a petition for appeal on September 1, 1944, with instructions from appellant's counsel that the petition was to be held in a state of suspense in the clerk's office pending final determination as to whether the appeal would be perfected does not satisfy the requirements of 28 U. S. C. 47(a) requiring that the appeal be taken within sixty days after the entry of the final judgment or decree of the District Court. Under the circumstances, the filing of the petition for appeal is tantamount to no action with respect to compliance with the provisions of the United States Code referred to above.

In its October term, 1942, the Supreme Court amended its rules as follows:

> "An appeal will be out of time unless, within the period fixed by statute, application for allowance is

presented to the Judge or Justice who allows it. A prior timely application to another Judge or Justice does not extend the statutory period. See Matton Steamboat Company v. Murphy, 319 U. S. 412".

It seems clear that appellants have failed to comply with the provisions of the statute requiring the perfection of an appeal within sixty days from the date of the entry of the final order or decree. The appeal should be dismissed.

Washington counsel for appellant have not to date been served with a copy of the petition for and order allowing the appeal together with a copy of the assignments of error and of the statement required by Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States and a statement directing attention to the provisions of Paragraph 3 of Rule 12 of said Rules. Washington counsel for appellant are informed that counsel for the United States and for the Interstate Commerce Commission received copies of the petition for and the order allowing the appeal together with a copy of the assignment of errors and of the statement required by paragraph 1 of Rule 12 of the Rules and a statement directing attention to the provisions of paragraph 3 of the Rules on October 16, 1944. Appellee has accordingly violated paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States in that it failed to serve the documents referred to therein upon appellee within five days after the allowance of the appeal by the District Court (the order was signed by the District Court on September 27, 1944 and the five day period as specified in Rule 12, Paragraph 2 expired October 2, 1944).

The Commission's order dated October 14, 1943, granted to Smoky Mountain a certificate of public convenience and necessity under 207 of Part II of the Interstate Commerce Act (49 U. S. C. 307) to operate as a common carrier by

motor vehicle of passengers, baggage, mail and newspapers over a described route between Clinton, South Carolina and Augusta, Georgia, and denied to Carolina Scenic Coach Lines, a co-partnership, hereinafter called appellant a certificate of public convenience and necessity over the same route.

In its application to the Commission, Smoky Mountain sought a certificate authorizing operation between Clinton, South Carolina and Augusta, Georgia via Chappell, South Carolina, and Saluda, South Carolina. The application, therefore, proposed operations to be conducted in two states and under Section 205(a) of Part II of the Act (49 U. S. C. 305(a), the Commission referred the application to a joint board composed of a member from each state for hearing. Appellant made no objection either before the joint board or before the Commission attacking the validity of the Commission's action in referring the application to a joint board for hearing.

On its merits, the Commission's report points out that the application of Smoky Mountain was designed to serve two purposes,—first, to provide local service at points along the proposed route not served by applicant or any other carrier and second, to provide a link for through service between New York and Florida points in connection with the Nationwide system of bus service rendered by the National Trailways System of which Smoky Mountain is a member. The Commission found that persons desiring to travel by bus between points along the eastern seaboard states and Florida are now virtually dependent upon the services of Greyhound. Traffic originated by Trailways member companies north of Charlotte, North Carolina is transferred at that point to Greyhound, which company transports the passenger to destination. On the return trip from Florida by Greyhound, the passenger is not re-

turned to Trailways' members at the point of the original interchange but such passenger is held on the Greyhound buses and carried to destination. Trailways' members participate in a portion of the southbound haul to Florida but due to the missing link in the through service its members are denied any part of the return traffic from Florida. In approving the application of Smoky Mountain the Commission found that:

> "The last missing link in a chain of through routes of Trailways' members between northern points and Florida will be completed."

The Commission further found that Trailways' members will be in a position to stimulate potential Florida traffic at points along their route and any detriment that Greyhound may suffer by reason of the establishment of another system of north-south service is out-weighed by the benefit to be derived by the public.

The Commission found also that appellant has operated between Clinton and Augusta for many years and together with another carrier (operated by Hamish Turner, a partner composing the partnership of appellant) has connecting routes available between Charlotte and Augusta via Union, Newberry and Saluda. Appellant and its associated carrier did not see fit to provide convenient connections and more expeditious service between Charlotte and Augusta until two weeks before the hearing on the application of Smoky Mountain. The Commission observed that Trailways is an association of independent carriers and the maintenance of coordinated service requires the cooperation and friendly relations between its various members. The inability of Trailways' members to induce appellant and its associate carrier to place their routes in the Trailways system delayed the establishment of the through route between Charlotte and Augusta and resulted in the

filing of the application of Smoky Mountain to provide that service. The Commission found that the public would benefit by having available the through routes between New York and Florida and that the best interest of the public will be served by granting the application of Smoky Mountain and denying the application of appellant. On these and other findings, the Commission made the ultimate finding that the present and future public convenience and necessity required operation by Smoky Mountain between Clinton and Augusta and that the present and future public convenience and necessity do not require the proposed operations of appellant and that its application should be denied.

Appellant made five principal contentions in the Court below:

(1) That the Commission erred in its failure to find that there is no need for "local passenger service over the proposed route in addition to that now adequately supplied by Scenic or by other operators already in the field;

(2) that the Commission erred in finding that public convenience and necessity require operation over the proposed route as a "bridge" route between North Atlantic States and Florida;

(3) that the Commission erred in its failure to take proper cognizance of the adverse effect of the proposed new operation on the existing operation of Scenic;

(4) that the Commission erred in failing to consider the condition of the proposed new route, particularly in relation to its contemplated use as part of a regular north-south highway; and

(5) that the Commission erred in deciding this case upon a record made before an improperly constituted joint board.

Points 1 through 4 clearly present questions as to the weight of evidence. Thus, appellant's contentions may be resolved into two divisions:

1. Was there substantial evidence to support the Commission's findings, and

2. Did the Commission improperly refuse to submit the application to an examiner for hearing and disposition?

The Court below found that the Commission had ample facts before it to support its order. It is elementary that the weight and credibility of the evidence is for the Commission and that its conclusions must be sustained if supported by substantial evidence. In the very recent case of *McLean Trucking Company* v. *United States*, 321 U. S. 67, 88, 64 S. Ct. 370, 381, Mr. Justice Rutledge said:

> "If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

The same rule was followed in *Interstate Commerce Commission* v. *Jersey City*, 64 S. Ct. 1129, 1139, Mr. Justice Jackson remarked that:

> "It is not for the Court to set aside without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions of administrative tribunal".

This Court in *Western Chemical Company* v. *United States*, 271 U. S. 268, 270, said "to consider the weight of the evidence is beyond our providence".

It is well settled that administrative orders are presumed by the courts to be valid. See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145, 59 S. Ct. 754, 83 L. Ed. 1147; *Helvering* v. *Clifford*, 209 U. S. 331, 336, 60 S. Ct.

554, 84 L. Ed. 301; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 64 S. Ct. 281; *Dobson* v. *Commissioner*, 320 U. S. 489, 64 S. Ct. 239.

In Virginia Stage Line v. *United States*, 48 Sup. 79, 83, the District Court in relying on several Supreme Court decisions said:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. Alton Railroad Company v. United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; Gray v. Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since 'The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' Board of Trade of Kansas City v. United States, 1942, 312 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432.
>
> "Accordingly, aware of our duty in the proper case to set aside an order of the Commission which is not supported by substantial evidence or which is clearly based on an error of law, we refuse to accept the allegations of Virginia Stage in place of the conclusions of the Commission, since we find no patent reversible error wherein the Commission has transgressed. United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971."

See also *Loving* v. *United States*, 310 U. S. 609 and cases cited therein.

Applicant's second contention is that the Commission erred in deciding this case upon a record made before an

improperly constituted joint board. Section 205(a) requires the Commission to submit certain matters involving operations in not more than three states to a joint board but does not require such submission when operations in more than three states are involved. Here the application related to operations in not more than three states and was accordingly referred to a joint board rather than to an examiner. The only issue, therefore, is whether the Commission is entitled to determine from the facts shown in the application whether the joint board or examiner procedure is required or whether it must postpone that determination and make it only from the facts as indicated by the proof. Smoky Mountain's application involved operations proposed to be conducted in not more than three states. The Commission referred it to a joint board for hearing. The proof was divided into two divisions, the need for service over the proposed route and the need for an all Trailways route between New York and Florida.

The Court below found that the case was properly referred to a joint board for hearing but even if this were not so, appellant could not raise an objection as it failed to object to the joint board procedure either before the board or the Commission. The Court below further found that reference to a joint board was not material as the Commission reviewed the facts and exercised its independent judgment in its report.

The assignment of an application for hearing under the provisions of Section 205(a) before a joint board or examiner now seems well settled. In the recent case of *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (motion to affirm granted and judgment affirmed by the United States Supreme Court on October 9, 1944) the United States District Court for the Northern District of

California in dismissing an action to set aside an order of the Commission stated:

> "In making the reference, the operation proposed by the applicant must necessarily be determined from the application rather than from the supporting evidence."

The Court quoted with approval the statement of the Commission that:

> "In the absence of any showing of any intentional deception or fraud, an application, once lawfully referred either to an examiner or to a joint board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more states, so that the number actually finally involved is less than originally appeared. Any other conclusion would tend to uncertainty and confusion. In innumerable hearings, jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular state."

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed or in the alternative the appeal should be dismissed.

WILLIAM A. ROBERTS,
JAMES E. WILSON,
R. G. CHERRY,
Counsel for Smoky Mountain Stages, Inc.

October 30, 1944.

I hereby certify that I have this 30th day of October, 1944 served a copy of the foregoing motion to dismiss or affirm on counsel for appellant and on counsel for the United States of America and the Interstate Commerce Commission.

JAMES E. WILSON.